

4. TRIAL MATTERS

4.A. PROCEEDINGS INVOLVING CLASSIFIED MATTER (MRE 505) OR DISCLOSURE DETRIMENTAL TO NATIONAL SECURITY (MRE 506)

4.A.1. General

Convening authorities, military judges, presidents of a special court-martial without a military judge, summary courts, trial counsel, defense counsel and Article 32, UCMJ investigation officers as appropriate shall protect the security of classified matter and other government information that, if disclosed, would be detrimental to national security. If a court-martial involves classified information, the convening authority, military judge, president of a special court-martial without a military judge, summary court, and trial counsel, as appropriate, are charged with the responsibility of ensuring compliance with applicable provisions of the Information Security Program, COMDTINST M5510.21 (series), RCM 401(d) and 407(b), and MRE 505-506. Article 62, UCMJ provides that the Government may appeal an order or ruling by a military judge that directs the disclosure of classified material, imposes sanctions for the nondisclosure of classified information, or refuses to issue a protective order sought by the Government to prevent the disclosure of classified information. [See, RCM 908.] The convening authority will notify the Chief Counsel via Commandant (G-LMJ) of any case involving classified information.

4.A.2. Security Clearance of Personnel

If classified matter is to be used for prosecution, appropriate personnel security clearances in accordance with the Information Security Program, COMDTINST M5510.21 (series) must be held by all members of the court, members of the prosecution and defense, court reporters and interpreters, and all other persons whose presence is required when classified matter is introduced before the court. If a civilian defense counsel represents the accused, or if civilian court reporting services are used, such counsel or court reporting service must likewise be cleared before classified matter may be disclosed to him or her. The necessity for clearing the accused, and the practicability of obtaining such clearance, rests in the sound discretion of the convening authority and may be one of the considerations in the determination to try a particular case or in determining the appropriate forum. If it appears during the course of a trial that classified matter will be disclosed, and if the provisions of this section have not been complied with, the military

judge or summary court shall adjourn the court and refer the matter to the convening authority. [See, MRE 505.]

4.A.3. Procedures Concerning Spectators

Special considerations and procedures apply to prevent dissemination of classified information to other than authorized persons. [See, RCM 806 and 405 and MRE 505-506.]

4.A.4. Records of Trial Evidence

Special procedures apply to the preparation of records of trial that include classified material. [See, paragraph 5.A.4 below.]

4.B. SPECTATORS AND RELEASE OF INFORMATION AT TRIAL

The information contained in this section is a synopsis of the information provided in U.S. COAST GUARD MEDIA RELATIONS IN HIGH-VISIBILITY COURT MARTIAL CASES; A PRACTICAL GUIDE provided to each district, MLC, and Area public affairs officers and to all staff judge advocates. A copy of the guide is included as enclosure (15) and should be referred to by the user for more complete information than is provided in this section.

4.B.1. Release of Information

4.B.1.a. General

There are valid reasons for making information about the administration of military justice available to the public. The task of striking a fair balance between the protection of members accused of offenses against improper or unwarranted publicity pertaining to their cases, and public understanding of the problems of controlling misconduct in the military service and the workings of military justice depends largely on the exercise of sound judgment by those responsible for administering military justice and by representatives of the press and other news media. At the heart of all guidelines pertaining to the furnishing of information concerning an accused or the allegations against him or her is the mandate that no statements or other information shall be furnished to news media for the purpose, or which could reasonably have the effect of influencing the outcome of a trial.

4.B.1.b. Applicability

These provisions apply to all persons who may obtain information as the result of duties performed in connection with the processing of an accused, the investigation of suspected offenses, or trials by court-martial. These provisions are applicable from the time of apprehension, the preferral of charges, or the commencement of an investigation directed to make recommendations concerning disciplinary action, until the completion of trial or

disposition of the case without trial. These provisions also prescribe guidelines for the release or dissemination of information to public news agencies, other public media, or other persons or agencies.

4.B.1.c. Release of information

(1) As a general matter, Coast Guard employees should not initiate release of information pertaining to an accused. Information of this nature should be released only upon specific request therefor, and, subject to the following guidelines, should not exceed the scope of the inquiry concerned.

(2) Except in unusual circumstances, information subject to release under these provisions should be reviewed and released by the cognizant public information officer and requests for information received by others from the media should be referred to such officer for action. In high visibility cases a trained attorney should assist the cognizant public information officer. [See, enclosure (15).] When a member is suspected or accused of an offense, care should be taken to indicate that the member is alleged to have committed, or is suspected or accused of having committed an offense, as distinguished from stating or implying that the accused has committed the offense(s).

4.B.1.d. Information Subject to Release

On inquiry the following information concerning a member accused or suspected of an offense(s) **may generally be released** except as provided in subparagraph 4.B.1.f below.

- (1) The accused's name, grade, age, unit, and regular assigned duties.
- (2) The substance of the offense(s) of which the individual is accused or suspected.
- (3) The identity of the victim of any alleged or suspected offense, subject to any restrictions provided by the Victim and Witness Protection Act of 1982 (Public Law 97-291), 18 U.S.C. §§ 1512-5, 3663-4. [See, section 3.M above.]
- (4) The identity of the apprehending and investigating agency, and the identity of attorney for the accused, if any.
- (5) The type and place of custody, if any.
- (6) Information that has become a part of the record of proceedings of the court-martial in open session.
- (7) The scheduling or result of any stage in the judicial process.
- (8) The denial of the commission of any offense(s) of which he or she may be accused or suspected (when release of such information is approved by the attorney of the accused).

4.B.1.e. Information Prohibited for Release

The following information concerning a member accused or suspected of an offense(s) generally **may not be released** except as provided in subparagraph 4.B.1.f below:

(1) Subjective opinions, observations or comments concerning the accused's character, demeanor at any time or guilt of the offense or offenses involved.

(2) The prior criminal record (including other apprehensions, charges, or trials) or the character or reputation of the accused.

(3) The existence or contents of any confession, admission, statement or alibi given by the accused, or the refusal or failure of the accused to make any statement.

(4) The performance of any examination or test, such as polygraph examinations, chemical tests, ballistics tests, etc., or the refusal or the failure of the accused to submit to an examination or test.

(5) The identity, testimony, or credibility of possible witnesses, except as authorized in subparagraph 4.B.1.d.(3).

(6) The possibility of a plea of guilty to any offense charged or to a lesser offense and any negotiation or any offer to negotiate respecting a plea of guilty.

(7) References to confidential sources or investigative techniques or procedures.

(8) Any other matter when there is reasonable likelihood that its dissemination will affect the deliberations of an investigative body or the findings or sentence of a court-martial or otherwise prejudice the due administration of military justice either before, during, or after trial.

4.B.1.f. Exceptional Cases

The provisions of this section are not intended to restrict the release of information designed to enlist public assistance in apprehending an accused or suspect who is a fugitive from justice or to warn the public of any danger that a fugitive accused or suspect may present. Further, because the purpose of this section is to prescribe generally applicable guidelines, there may be exceptional circumstances that warrant the release of information prohibited under subparagraph 4.B.1.e above, or the non-release of information permitted under subparagraph 4.B.1.d above. In these cases the servicing legal office and OEGCMJ shall be responsible for determining whether questionable material shall be released. [See, enclosure (15)]

4.B.1.g. Military Judge's Authority

The foregoing is in no way to be viewed as in derogation of the authority of the military judge, who, upon being detailed, is, in his or her discretion, empowered to regulate many of the matters discussed in this section by court order. [See, RCM 801.]

4.B.2. Spectators at Courts-Martial Sessions

The sessions of courts-martial shall be public and, in general, all persons except those who may be required to give evidence shall be admitted as spectators. The trial counsel shall post a Notice of Public Trial [see, enclosure (16h) for sample]. Whenever necessary to prevent the dissemination of classified information to other than authorized persons or for other good cause, the convening authority, the military judge of a general or special court-martial, or the president of a special court-martial without a military judge may direct that spectators be excluded from a trial or a portion thereof. In all situations, spectators or classes of spectators may be excluded only, when in the discretion of the military judge of a general or special court-martial, he or she determines such action to be legally necessary and proper. [See, RCM 806.]

4.B.3. Spectators at Pretrial Investigations

The sessions of a pretrial investigation convened in accordance with Article 32, UCMJ should ordinarily be open to the public. [See, RCM 405(h)(3)]. A convening authority will consult with the servicing legal office before restricting access to a pretrial investigation.

4.C. ARTICLE 39(A), UCMJ SESSIONS

4.C.1. Pleas

As authorized under Article 39(a), UCMJ a session of the court without the presence of the members may be called for the purpose of holding the arraignment and receiving the pleas of the accused. [See, enclosure (16a), Rule 22.]

4.C.2. Motions

Pretrial motions will be submitted in accordance with the orders of the military judge assigned to the case [see, enclosure (16b) for a sample Court Order No. 1]. Unless otherwise permitted or ordered by the military judge assigned to the case, pretrial motions, answers and rulings will follow the format contained in enclosures (16c-e), respectively. [See, enclosure (16a), Rule 9.]

4.C.3. Custody and Restraint of Accused

Physical restraint shall not be imposed on the accused during open sessions of the court-martial unless prescribed by the military judge. [See, RCM 804(c)(3).]

4.C.4. Conditional Pleas

The accused may enter a conditional plea of guilty in accordance with RCM 910(a)(2). Such plea must be in writing and must set forth the particular pretrial motion(s) to which the right of appeal is reserved. The government's consent to the plea may be given by trial counsel and shall be noted on the document over the signature of the trial counsel.

4.C.5. Oaths

4.C.5.a. Military Judges

A military judge, certified in accordance with Article 26(b), UCMJ may take a one-time oath to perform his or her duties faithfully and impartially in all cases to which detailed. This oath may be taken at any time and may be administered by any person authorized by Article 136, UCMJ to administer oaths. Once such an oath is taken, the military judge need not be sworn again at any court-martial to which subsequently detailed. Military judges will customarily be given a one-time oath. In the event that a military judge detailed to a particular court-martial has not been previously sworn, the trial counsel shall administer the oath to the military judge at the appropriate point in the proceedings. The following oath shall be used for the swearing in of military judges [see, Discussion to RCM 807(b)(2)]:

Do you swear (or affirm) that you will faithfully and impartially perform, according to your conscience and the laws applicable to trials by courts-martial, all the duties incumbent upon you as military judge to this court-martial, so help you God?

4.C.5.b. Counsel

Any military counsel, certified in accordance with Article 27(b), UCMJ, may be given a one-time oath. Such oath will customarily be administered when military counsel is certified. The oath may be given at any time and by any person authorized by Article 136, UCMJ to administer oaths. Once such an oath is taken certified military counsel need not be sworn again at any trial to which he or she is detailed, or in any case in which he or she is serving as individual counsel at the request of the accused. Certified military counsel who have taken one-time oaths administered by armed services other than the Coast Guard need not again be sworn in courts-martial convened in the Coast Guard. Counsel who are not certified in accordance with Article 27(b), UCMJ, including all civilian counsel, must be sworn in each case. The following oath may be used in administering a one-time oath to counsel [see, Discussion, RCM 807(b)(2)]:

Do you swear (or affirm) that you will faithfully perform the duties of counsel in the case now in hearing, so help you God?

4.C.5.c. Court Members

Court members may be given one oath for all cases that are referred to the court in accordance with the convening order that detailed them as members. In the event the convening order is amended, a new member shall be sworn when he or she arrives. This oath may be administered by any officer authorized by Article 136, UCMJ to administer oaths. When court members are not sworn at trial, the fact that they have previously been sworn will be recorded in the transcript or record of trial. The oaths used for court members will be those prescribed in the discussion to RCM 807(b)(2). [See also, Section II, Appendix 8, MCM.]

4.C.5.d. Reporters

Any court reporter, military or civilian, may be given a one-time oath. The oath normally will be administered by trial counsel in the first court-martial to which the court reporter is assigned. Once such oath is taken, the court reporter need not be sworn again at any trial to which assigned. When the court reporter is not sworn at trial, the fact that he or she has been previously sworn will be recorded in the transcript or record of trial. The following oath may be used in administering a one-time oath to court reporters [see, Discussion, RCM 807(b)(2)]:

Do you swear (or affirm) that you will faithfully perform the duties of reporter in any court-martial to this court-martial, so help you God?

4.C.5.e. Interpreters

Interpreters will be sworn by trial counsel as provided in the discussion to RCM 807(b)(2). [See also, Appendix 8, MCM.]

4.C.5.f. Recording One-time Oaths

The military judge and certified counsel who take the oath prescribed above shall transmit a signed copy to the Chief Counsel, U.S. Coast Guard. A signed copy of the oath taken by the court reporter shall be filed in his or her official service record. The copies shall bear below the signature of the person sworn a statement signed by the person who administered the oath, in a form as follows:

[Quote the Oath and state purpose why administered; followed by]
The undersigned personally administered the foregoing oath to the above-named [Person Sworn], this ____ day of _____, 20____, at [Location].

Signature and Rank

4.D. PRESENTENCING PROCEDURES, PERSONAL DATA, AND CHARACTER OF PRIOR SERVICE

In accordance with RCM 1001(b)(2), trial counsel may introduce certain evidence from the personnel records of the accused. [See, RCM 1001(b)(3), concerning admission of evidence concerning accused's prior convictions.] Personnel records of the accused include all those records made and maintained in accordance with the Coast Guard Personnel Manual, COMDTINST M1000.6 (series); Source Data Automation (SDA) II User Manual, HRSICINST M5231.2 (series); Personnel & Pay Procedures Manual, HRSICINST M1000.2 (series); and the Military Personnel Data Records (PDR) System, COMDTINST M1080.10 (series) that reflect the past military efficiency, conduct, performance, and history of the accused.

4.E. COURT-MARTIAL PUNISHMENT LIMITATIONS

4.E.1. No Automatic Reduction

The administrative action of automatic reduction to the lowest enlisted pay grade authorized under Article 58a, UCMJ, shall as a matter of policy not be effected in the Coast Guard.

4.E.2. Hard Labor Without Confinement

Hard labor without confinement shall be performed in addition to other regular duties and may be specified to run for one, two, or more hours per day. The member's immediate commander shall determine the duration per day and time it starts. Hard labor without confinement shall not be performed on the member's Sabbath. The member receives credit for having performed hard labor without confinement on the Sabbath if the Sabbath falls within the prescribed period of hard labor without confinement.

4.E.3. Reservists Ordered to Active Duty

4.E.3.a. Approved by Commandant (G-WTR)

A reservist tried by court-martial after an order approved by Commandant (G-WTR) to active duty pursuant to paragraph 3.E.2 above may receive any punishment otherwise authorized by the court-martial.

4.E.3.b. Not Approved by Commandant (G-WTR)

Unless the order to active duty under paragraph 3.E.2 above is approved by Commandant (G-WTR), confinement is not an authorized punishment for a reservist ordered to active duty at court-martial. In addition, the reservist accused may not be retained on active duty to serve any other punishment [see, discussion to RCM 1003(c)(3)]. Imposed forfeitures

may be collected, and imposed restrictions on liberty may be served during subsequent periods of inactive duty training or active duty.

4.F. GOVERNMENT APPEAL FROM ADVERSE RULINGS AT TRIAL

4.F.1. General

Article 62, UCMJ and RCM 908 authorize the United States to appeal a ruling or order of the military judge that terminates the proceedings with respect to a charge or specification, excludes evidence that is substantial proof of a fact material to the proceedings, or jeopardizes the security of classified material.

4.F.2. Procedures and Persons Authorized to Act

4.F.2.a. Trial Counsel

Trial counsel may request a delay in accordance with RCM 908(b)(1) when a ruling or order is issued subject to appeal under certain circumstances. In any such case, trial counsel shall confer with appellate government counsel at Commandant (G-LMJ). Trial counsel shall present a summary of the ruling or order, the issue involved, and the evidence in the case and describe the reason(s) why trial counsel believes the ruling or order is one that should be appealed. This conference shall occur as soon as practicable, but in any event shall take place within 24 hours of the military judge's ruling. The purpose of this time limit is to minimize the expense and inconvenience by allowing trial to continue after a delay of no more than one day in cases where appellate government counsel is able to immediately determine not to appeal the ruling or order.

4.F.2.b. Appellate Government Counsel

Once advised of the matter as set forth in subparagraph 4.F.2.a above, appellate government counsel shall authorize trial counsel to advise the military judge and parties that:

(1) The government will not appeal the ruling, in which case the trial should proceed;

(2) The government has decided to appeal, in which case trial counsel shall provide the written notice required by RCM 908(b)(3); or,

(3) The decision to appeal is being considered and will be made within 72 hours as provided in RCM 908. A notice of appeal shall not be filed by trial counsel without the concurrence of appellate government counsel. In the interest of economy of court-martial resources, the decision to file a Notice of Appeal shall be made as expeditiously as possible, normally within 24 hours, but may be delayed up to 72 hours as provided in RCM 908. The final decision whether to file an appeal with the Coast

Guard Court of Criminal Appeals shall be made after government appellate counsel has received the matters set forth in subparagraph 4.F.2.c below.

4.F.2.c. Forwarding Notice of Appeal

Notice of appeal filed under RCM 908 shall be forwarded to appellate government counsel, Commandant (G-LMJ), within 10 days after the date of the judge's ruling for decision. In addition to those matters listed in RCM 908(b)(6) the following shall be forwarded with the appeal:

(1) Appeal

A prepared appeal substantially in the form provided in Rule 21, Courts of Criminal Appeals Rules of Practice and Procedure, to include:

- (a) A summary of the proceedings;
- (b) A statement of facts that must have been determined by the military judge and are pertinent to the error assigned (*note*: Under Article 62, UCMJ, the Coast Guard Court of Criminal Appeals may act only with respect to matters of law, not withstanding its fact-finding powers under Article 66, UCMJ);
- (c) The error(s) assigned followed by an argument supporting the government's position on each error;
- (d) The specific relief requested; and,
- (e) A certificate of Notice of Appeal described in RCM 908(b)(3). The certificate of service must reflect the date and time of the military judge's ruling or order from which the appeal is taken and the time and date of service upon the military judge.

(2) Record of Trial [ROT]

(a) An authenticated ROT should accompany the appeal package. Only that portion of the ROT involving the alleged error(s) need be transcribed, authenticated, and forwarded. In extraordinary cases where undue delay would be encountered awaiting authentication, the trial counsel should forward an unauthenticated ROT with the material required under RCM 908(b)(6) to be followed by the authenticated ROT.

(b) Trial counsel should retain an authenticated copy of the ROT so that trial may resume after the Coast Guard of Criminal Appeals issues a decision, if authorized.

(3) Letter of Justification

The appeal package must contain a letter from trial counsel indicating why the appeal is being taken and describing the anticipated impacts should the military judge's ruling be affirmed. For example, circumstances not apparent in the ROT including pendency of other cases affected or unique import of the case to discipline, morale, or the integrity of military justice should be set forth in the letter.

4.F.2.d. Authority to Conduct Further Proceedings

After notice of a decision by the Coast Guard Court of Criminal Appeals [CGCCA] or Court of Appeals for the Armed Forces [CAAF] is provided, the trial may proceed, if authorized, in a manner consistent with the decision unless further proceedings are stayed by order of a higher court.

4.G. APPELLATE RIGHTS

Each convicted accused shall be advised of his or her appellate rights, using enclosures (17a-c), as applicable, prior to adjourning the court-martial. A completed appellate rights form shall be included as an appellate exhibit in the record of trial. [See, RCM 1010.]

